Nos. 09-1454, 09-1478

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN AS AMICUS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS[1]

The Children's Law Section for the State Bar of Michigan is comprised of 492 members. Unlike other groups appearing as amici in this case, the Children's Law Section is comprised not only of attorneys who represent parents, children, and the Department of Human Services in child protective proceedings, but membership also includes the juvenile judiciary. The fact that our members play different roles and enter at different stages of child protection cases provides a unique vantage point for assessing the need for consistent and reliable procedures at the investigative phase of child protection cases.

The impact of a rule of law governing how interviews of suspected victims of child abuse are conducted will be felt by all of our members who, despite their different roles in the system, share an interest in developing a legal landscape that offers the best outcomes for children and their families – even if they are involved in a CPS investigation. That interest compels the Children's Law Section, as amicus curiae, to highlight the importance of a rule from this Court that would result in consistent, humane, and lawful interviews of suspected victims

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[1] Counsel of record, Elizabeth Warner, and co-counsel Jodi Latuszek, authored this brief without compensation by the party or anyone else. The Children's Law Section of the State Bar of Michigan paid for the preparation and submission of the brief. For consent to file the brief, counsel relied on the written blanket consents provided by all the parties to all amici.

of child abuse. Interviews with those core features are interviews that will ultimately serve the best interest of the children at the very heart of CPS investigations because they produce results that can be used in court to secure legal results that will protect them from further abuse.

SUMMARY OF ARGUMENT

The protection of children from unsafe homes and unfit caretakers is the task of public child welfare agencies, the state civil juvenile courts, and criminal law enforcement. Sadly, a child can be hurt more than helped by state intervention. Some degree of victimization of a child by the official response to a report of abuse or neglect is inherent in these cases.[2] Harm can occur whether the abuse accusation is true or not. Sometimes the juvenile justice system separates a child from a safe parent for a variety of reasons, including a flawed protective services investigation. Without question, that is an intolerable harm to a child.[3] For confirmed sexual abuse victims,

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[2] Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 540 (2005) ("The violence that these official investigations do to the children can be just as destructive as the private violence they seek to avert.").

[3] *Santosky v. Kramer*, 455 U.S. 745, 760-761 (1982) ("[T]he child and the parents share a vital interest in preventing erroneous termination of their natural relationship"); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) ("[T]he State registers no gain

(Continued on following page)

the failures of the legal system have "frequently resulted in children being victimized by the abuse and then re-victimized by the judicial system through misguided prosecutorial efforts."[4] True or not, mistreatment or manipulation of a child in an abuse investigation should be not tolerated by any court, especially when the investigators violate laws or the Constitution. Simply put, the rule of law is the best child protection.

If this court decides it has jurisdiction in Question 2, the amicus supports affirming the Ninth Circuit ruling on Question 1. Amicus supports constitutional protection for the respondent child S.G., a nine year old special education student who was seized, detained, and interviewed by CPS and police investigators at her school, until she accused her father of sexually abusing her. The lower court rule works on a practical and legal level. The exigent circumstances exception will allow officials to protect a child from serious harm when time and immediate danger do not allow the prior involvement of the juvenile courts. The child interview requirement for either parental consent, or a court order based on probable cause, properly align the investigative phase of a child protective services case with both the

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towards its declared goals when it separates children from the custody of fit parents.").

[4] Timothy L. Arcaro, *Child Victims of Sexual Abuse and the Law*, 12(3) Mich. Child Welfare L.J. 2, 2 (2009).

Constitution and the welfare of a defenseless child.[5] The petitioners advocate for essentially unsupervised discretion for the child welfare workers. The petitioners say a court interview order would burden them and the court. But the juvenile judiciary is capable of handling the necessary court orders, as it does now routinely on other investigation tasks.

The constitutional rules for child protective services (CPS) investigations should be considered with an understanding of the civil juvenile legal system that governs that investigation and the dependency case that may follow.[6] A basic understanding of the

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[5] Judicial review by the warrant process reduces harmful mistakes for the child and her family. Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 Ohio St. L. J. 913, 979 (2004) (Summary rescues of children without warrants increases the volume of court cases, but "translates into more mistakes, which in turn result in more children being needlessly placed in foster care.").

[6] "Dependency court is that part of the juvenile court that handles child maltreatment cases. A child who has been adjudicated maltreated or is under state custody is often referred to as a dependent child. Child maltreatment is the general term used to describe all forms of child abuse and neglect that give rise to dependency court jurisdiction." Marvin Ventrell, *The History of Child Welfare Law*, in *Child Welfare Law and Practice* 113-114 (Marvin Ventrell & Donald N. Duquette eds., 1st ed. 2005). "Dependency" is the most common name for the child protection case filed by a public child welfare agency in a civil court. These cases go by other names, like abuse and neglect, or child-in-need-of-aid. This brief refers to the civil court handling dependency cases as a "juvenile court," but the cases may be in a probate, family, surrogacy, or other specialized court. *Id.* at 139. At one time criminal prosecution was the exclusive remedy for

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evidentiary requirements of dependency cases, and the capabilities of the juvenile judiciary, is important to assess some of the broad and unsupported arguments of the petitioners. Because CPS workers appear much more frequently than police officers in our civil court system, the focus will be on them in this brief.

Part I identifies the federal laws relevant to these investigations. Congressional findings and enactments are the best sources for arguments based on child welfare policy. The text and context of Congressional enactments do not support the broad generalizations and justifications attributed to them by the petitioners and their amici.

Part II discusses state laws on child interviews at school and other locations. Reliance on the state laws does not answer the constitutional question presented in this case. Numerous state laws that are consistent in permitting some interviewing practices do not demonstrate that the petitioners' tactics were constitutionally reasonable in this instance. Those state laws simply reflect federal funding requirements for states to enact these laws. State statutes do not define or obliterate constitutional rights. Many states permit CPS investigators to interview children at school. Very few of them extend that permission to a

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child abuse. Now the dependency court in the last half of the 20th Century has become an "active tribunal to determine whether a child is abused or neglected, and if so, what disposition is appropriate" for the child's safety and welfare. *Id.* at 138.

police officer, like Deputy Alford. The petitioners' judicial burden argument is weakened by the fact that existing law already requires judges to rule on requests for investigation or interview orders.

Part III explains the harm to the juvenile justice system from an unregulated child interview like the one that occurred in this case. This adverse impact on the civil dependency case of flawed interviewing practices is a relevant consideration if the Court applies the balancing test in *Illinois v. Lidster* as proposed by the petitioners.[7] All parties to a dependency case benefit from a child interview that is humane, reliable, and lawful. Anything less leaves a factual ambiguity that does not further the child protection goals of the juvenile court.

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[7] *Illinois v. Lidster*, 540 U.S. 419 (2004).

ARGUMENT

I. FEDERAL LAW HAS SOME VALUE TO ASSESSING THE POLICY ARGUMENTS OF THE PARTIES AND THEIR AMICI. CONGRESSIONAL FINDINGS AND LAWS PROVIDE AN EXPRESSION OF NATIONAL CHILD WELFARE POLICY AND BEST PRACTICES IN CIVIL AND CRIMINAL INVESTIGATIONS OF CHILD ABUSE AND NEGLECT.

A. National Child Protection Policy Seeks Protection Of Children And Their Families In Child Abuse Investigations.

The petitioners cite federal laws for the proposition that the investigation tactics used in this case were lawful and appropriate. Yet, the citation is unavailing because Congress does not make much substantive law in this area, and the petitioners are appropriately not claiming that it has.[8] Their argument apparently is that their actions must be reasonable under the Fourth Amendment if Congress has suggested their practices to the states. Therefore,

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[8] "[M]ost provisions of these statutory schemes are not intended to and do not establish substantive law that applies to individual cases." Rather, a failure to adopt a federally compliant state plan can result in fines against the state. Miriam Rollin, Frank Vandervort, Ann M. Haralambie, *Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process*, in *Child Welfare Law and Practice* 151 (Marvin Ventrell & Donald N. Duquette, eds., Bradford Publishing Co., 1st ed. 2005).

their actions must be reasonable for Fourth Amendment purposes because, in essence, they are following national child protection policy. For those federal law based arguments, it is worthwhile to look at the text of those laws on subjects that both sides have introduced into this discussion. That would be on the topics of child harm, non-offending parents, family rights, and legal protectors for the child. This law based analysis, devoid of policy rhetoric, reveals that federal laws do not coincide as definitively with their side as petitioners claim.

Congress has made findings, and enacted laws, relevant to the investigative phase of a child welfare case.[9] Two stand out. One is the Child Abuse, Prevention and Treatment Act of 1974 ("CAPTA").[10] CAPTA deals with mandatory reporting laws for child maltreatment and the investigative response to those reports. The other one is the Victims of Child Abuse Act of 1990 ("VOCA"),[11] which suggests best practices for investigation of child abuse cases.

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[9] State law remains the primary source of legal rules for many aspects of the child protection case. The procedural rules of juvenile court proceedings are local. The adjudicative, or trial, phase of the case is governed primarily by state law. State legislatures make the substantive law for juvenile court jurisdiction and the grounds to terminate parental rights.

[10] Pub. L. No. 93-247 (Jan. 31, 1974), 88 Stat. 4, 42 U.S.C. §§ 5101 to 5119c (2006), amended and reauthorized, Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 795 (June 26, 2003).

[11] Pub. L. No. 101-647, tit. II, sub. tit. A, 104 Stat. 4792 (Nov. 29, 1990), 42 U.S.C. §§ 13001 to 13004 (2006).

1. Congress Has Made A Finding That An Incompetent Sexual Abuse Investigation Can Harm Children And The Legal System.

Congress has found that the investigation of child abuse can harm children. One of the findings of VOCA in 1990 was that "in such cases, often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." 42 U.S.C. § 13001(4) (2006), Pub. L. No. 101-647, tit. II, sub. tit. A, § 211, 104 Stat. 4792 (Nov. 29, 1990). In a 1992 amendment to CAPTA's grant program, Congress singled out the special need to limit additional trauma caused by investigations in child sexual abuse and exploitation cases. 42 U.S.C. § 5106c(a)(1) (2006), Pub. L. No. 102-95, § 109.

The petitioners give mixed messages on where they stand on this truth that a sexual abuse investigation can harm a child. Camreta clearly endorses it. Brief Camreta, 11 ("The government has a compelling interest in conducting child-abuse investigations in a manner that is least likely to be traumatic for the child[.]"). Alford agrees that at least this child was upset from her unannounced encounter with the two of them. He admits Camreta was "posing difficult questions of S.G. in what was likely a confusing and uncomfortable situation." Brief Alford, 58. He gives an account of S.G.'s lengthy interview by Camreta in which for the first hour she denied any abuse. He discloses Camreta thereafter engaged in persistent

questioning of S.G. after she insisted that her father's touching "all over" was not "bad." Brief Alford, 59. Twice in his brief Alford refers to the child as "a frightened girl." *Id.* On the other hand, earlier in his brief he refers to their interview of S.G. as a "modest measure" to ferret out child abuse, *id.* 12, that the interview in S.G.'s case "resulted in only a minimal intrusion into her privacy interests." Regardless of where the parties stand, the Congressional finding that a sexual abuse investigation is not harmless should be sufficient response to any petitioner supporter that denies or discounts it.

2. Federal Law Recognizes The Importance Of Enforcing The Civil Rights Of The Family In A Child Abuse Investigation.

Congress has endorsed a more holistic and humane national child welfare policy than the government mission orientation of the petitioners. This is not a policy that sees this as a child allied with government on the one side and the parents on the other side. The very federal law petitioners cite most frequently, CAPTA, demands states protect the civil rights of the entire family in a child maltreatment investigation and that investigators treat the child well. Government actors who believe children have virtually no legal rights, who ignore the parents, who believe legal restrictions are a dangerous nuisance, and who mistreat a child in the initial interview, can

hardly argue they are following federal statutory requirements.

Congress made a finding that this is our national child welfare policy: "the child protection system should be comprehensive, child-centered, family-focused, and community based." This is accomplished in an environment that fosters "the health, safety, self-respect, and dignity of the child." 42 U.S.C. § 5101 (note) (2006), Pub. L. No. 102-295, tit. I, § 102(a)(7), 106 Stat. 188 (1992 CAPTA amendment).[12] In another CAPTA provision enacted in 2003 in the Keeping Children and Families Safe Act,[13] Congress affirmed that the child and family have legal rights worth protecting in an abuse investigation. A state cannot get CAPTA funding for its child protective services system unless it provides "training of representatives of the child protective services system regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment." 42 U.S.C. § 5106a(b)(2)(xix) (2006).

Petitioners would have to admit that Congress contemplated and expressly recognized that a child has "rights" during an abuse investigation when it decided to require investigators like petitioners to be

[12] "Safety" was added in a subsequent amendment.

[13] Pub. L. No. 108-36, § 114(b)(1)(A)(xix), 117 Stat. 810.

trained and notified of the existence of those rights. At a minimum these "legal rights" must include the Bill of Rights. Despite the clarity in which Congress articulated the notion that rights are to be afforded to the subjects of abuse investigations, petitioners are extremely dismissive of the constitutional rights of children, and ignore the rights of their parents. Ignoring the rights of children or their parents during abuse investigations is contrary to the national policy expressed by Congress. They address only the child's Fourth Amendment right to privacy, which in their view is virtually non-existent due to the child's age. Brief Alford, 50-53; Brief Camreta, Brief 11, 30-31. They make no mention of the child's familial right to have her family undisturbed by the government without proof. While Camreta focuses on avoiding parents, Alford is more intent on avoiding judges. Alford pointedly claims that probable cause and warrants just get in the way of their government mission of protecting children. Brief Alford, 46 (A warrant requirement would "frustrate the efforts of state officials to act quickly to protect the safety of children where abuse is suspected[.]"), 48 ("Imposing a requirement of probable cause would clearly frustrate the needs of government[.]"). In Deputy Alford's view, a state's adoption of the federal guideline for a rapid response to an abuse report precludes court orders in all cases. Brief Alford, 46, 62-63. But at least he is willing to submit to a reasonable suspicion standard for initiating a seizure of a child in order to interview her. *Id.*, 47-48. Camreta, on the other hand, says he is not constrained by *any* constitutionally based

standard. He invents a "reasonably credible evidence" standard, which has no legal precedent. Brief Camreta, 62-63. Although federal law recognizes that children and their families have some rights to protect them during CPS investigations, Camreta argues there are no legal restrictions on his work. Armed with nothing but a report to CPS, ("reasonably credible evidence"), he can seize a child and interview her just because he is investigating parental sexual abuse allegations. Brief Camreta, 12, 13-14, 34. His interpretation encompasses a per se approach to constitutional standards for conducting interviews: that his interviews with children are per se constitutional based on the subject matter alone. This proposition is a 180 degree turn from Congress's repeated recognition of "rights" during interviews. Such a per se rule opens the door to abusive tactics being used on those who have already suffered abuse.

Despite petitioners' arguments to the contrary, actual analysis of congressional policy reveals the legal positions and attitudes of the petitioners are not the national child welfare policy established by Congress. Instead of disregarding constitutional protections based on subject matter alone, national child welfare policy actually contemplates protections and safeguards by recognizing the "rights" of parties to child abuse investigations.

3. Congress Recommends That The Non-Offending Parent Be Included In The Investigation.

In Camreta's opinion the investigators can ignore parents to get access to their children because all parents are presumed unfit or uncooperative. Brief Camreta, 11 ("Seeking parental consent is simply not a safe or viable option."); 41 ("Seeking consent from either parent could be detrimental to the child."). By contrast, Congress recommends incorporating the non-offending parent into the investigation process because this helps the child and the justice system.

In the Victims of Child Abuse Act of 1990, 42 U.S.C. §§ 13001 to 13004 (2006), the participation of the non-offending parent, who is Mrs. Greene in this case,[14] is encouraged. This is based on a finding by Congress that at the investigation stage "too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." 42 U.S.C. § 13001(4) (2006). Another goal was to "increase the successful prosecution of child abuse offenders" by these child and family centered best practices. VOCA established discretionary grants for child advocacy centers, exclusively for physical and sexual abuse cases, and staffed by multi-disciplinary

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[14] "The term 'non-offending family member' means a member of the family of a victim of child abuse other than a member who has been convicted or accused of committing an act of child abuse[.]" 42 U.S.C. § 13001a(8).

teams. 42 U.S.C. §§ 13001b, 13002. The initial interview of the child can be conducted by well-trained interviewers in a comfortable setting. 42 U.S.C. § 13002(b)(2). Counseling for abuse victims and their families is part of the services. 42 U.S.C. § 13001b(c)(2)(B)-(C). These centers must also "provide support for non-offending family members." 42 U.S.C. § 13001b(a)(2), (b)(2)(a)(i).

B. The Child Has No Legal Protector Besides A Parent Or A Judge During The Investigative Phase. The Child's Right To Counsel Commences Later With The Filing Of A Court Dependency Case.

One shortcoming of federal law has implications for evaluating the child's legal protection in a maltreatment investigation. Juveniles interviewed as possible victims do not have the same right to counsel that a juvenile suspect has. S.G.'s only legal protectors at the investigation stage are a parent or a judge. The child does not get a legal advocate until a dependency case is filed. In its original enactment CAPTA required states to provide a guardian ad litem (GAL) to the child in every child maltreatment court case. Pub. L. No. 93-247 § 4(b)(2)(G). This GAL is not even required to be an attorney. A later amendment added that the guardian ad litem "may be an attorney or a court appointed special advocate" (CASA). 42 U.S.C. § 5106a(b)(2)(A)(xiii). For unknown reasons, states are not fully complying with even this minimal representation by a person who may not be a legal

professional. Only about 16% of children get a court appointed representative like an attorney, GAL, or CASA volunteer.[15] There is no system in place to provide representation to the child at the investigative phase of a child protection case in order to stop or ameliorate the trauma of an investigation before the dependency court case is filed. Consequently, the implementation of protections and safeguards during the interview process is an essential component to an effective interview.

II. NO RESOLUTION ON THE CONSTITUTIONAL ISSUE CAN BE MADE BASED ON A FEW STATE LAWS ON CHILD INTERVIEWS. THE INVESTIGATION LAWS PROVE POLICE ARE USUALLY NOT WELCOME AT SCHOOL. STATE JUDGES ARE ALREADY OBLIGATED BY STATE LAW AND FEDERAL COURTS TO DECIDE REQUESTS FOR INVESTIGATION ORDERS. THEREFORE, THE JUDICIAL BURDEN OBJECTION FAILS.

This Court should not entertain the state law excuse in this case. A common defense by social workers and police in § 1983 cases is to claim their actions were authorized by state law. The lower federal courts have not given it any weight. *E.g., O'Donnell v.*

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[15] *Child Maltreatment 2009*, 94 (U.S. Department of Health & Human Services), available on line at the Children's Bureau web site at www.childwelfare.gov. Only 32 states reported on this topic.

Brown, 335 F. Supp. 2d 787, 801-802 (W.D. Mich. 2004) ("State statutes and regulations cannot be construed to displace the protections of the Constitution – even when the statute acts to protect the welfare of children."); *Walsh v. Erie County Department of Job & Family Services*, 240 F. Supp. 2d 731, 751 (N.D. Ohio 2003) ("[T]he defendants contend that Ohio's statutory framework for learning about and investigating allegations of child abuse and neglect superseded their obligations under the Fourth Amendment . . . State statutes and regulations cannot displace the protections of the United States Constitution."). Neither should this Court. Legislatures have "no affirmative power to authorize States to violate" constitutional guarantees. *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

A. State Child Abuse Investigation Laws Are Similar Due To Federal Funding Incentives. They Are Not Independent Policy Choices By States Supporting A Reasonableness Claim.

Much in the same way as they use federal law references, petitioners and their amici cite state CPS investigation laws as authorizations for their challenged investigation practices. It is true that prompt and joint investigation obligations are part of many state laws about investigation of child abuse and neglect reports. Most states also authorize agency investigators to interview a child at school about the abuse report. Accordingly, the Ninth Circuit properly considered these laws as evidence of entanglement

with criminal law enforcement, which triggers the Fourth Amendment warrant and probable cause procedures under *Ferguson v. City of Charleston*.[16] The petitioners' citations to many more police entanglement laws outside Oregon prove that this is a nationwide problem. Any other relevance of these laws on other Fourth Amendment is less clear.

Perhaps the petitioners are using these state investigation laws to demonstrate the reasonableness of their conduct. The implied constitutional relevance is that this volume of substantially similar state laws express independently considered policies that are reasonable, and as such they render state actor conduct pursuant to them constitutional under a Fourth Amendment reasonableness analysis. Actually, these state investigation laws are all about money – federal money. Under CAPTA, if the states fail to enact certain federal mandates, they lose massive amounts of federal funding for their child welfare programs. It follows then that the state investigation laws resemble each other because they came from the same source – federal law. The similarities shared by numerous state interviewing statutes is not mere coincidence or an expression of independent policy statements by state legislatures. Therefore, this Court should not afford any deference or evidentiary value to them.

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[16] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

The federal funding impetus underlies the entire child welfare system today. Until the enactment of CAPTA in 1974, child welfare law was mostly left to the states, like other types of family law. But significant parts of the foster care and adoption systems have become identical in most states – essentially federalized – through a series of federal statutes starting in 1980.[17] Along the way, Congress has been conducting hearings, making findings on the scope and response to child maltreatment, ordering studies of policies and practices, and making significant policy shifts based on this research. So for over three decades Congress has been the author and enforcer of remarkably uniform child welfare policy and practices for the states through its spending power. There are basically two types of funding: large statewide

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[17] For example, there is the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 to 676 (2006). This was the law construed in *Suter v. Artist M.*, 503 U.S. 347 (1992). After *Suter*, Congress amended the statute substantially in the Adoption and Safe Families Act of 1997 (AFSA), Pub. L. No. 105-89. Other federal laws governing foster children, adoptions, and system improvements are:

Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-134, 114 Stat. 1266 (Oct. 17, 2000), 42 U.S.C. § 670 (2006);

Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879, 42 U.S.C. § 673b (2006);

Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, 42 U.S.C. § 1305 (Supp. 2009);

Child and Family Services Improvement Act of 2006, Pub. L. No. 190-288, 120 Stat. 1233, 42 U.S.C. § 621 *et seq.* (amending Social Security Act, tit. IV, part B).

block grants for federally compliant states and smaller discretionary grants for approved best practice programs. If a state wants federal funds for CPS, foster care, and adoptions, the state must replicate a federal model for case processing.[18] That is the same process as what this Court found when it reviewed the first major adoption law with this funding model in *Suter v. Artist M.*, 503 U.S. 347 (1992). Even before the Adoption Act, Congress was successful in using CAPTA funds to create mandatory reporting laws in all states with substantially similar provisions on investigating reports.

The Court cannot infer reasonableness, and therefore constitutionality, of the child's interview at school by citing state laws or administrative rules authorizing the investigation choices of the petitioners. Most states now have substantially the same practices because they have adopted the federal plan, which can require passing laws on investigation of child maltreatment reports.[19] The financial pay-offs to

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[18] For an excellent explanation of the incentivized federal-state funding model for child welfare practices, see Miriam Rollin, Frank Vandervort & Ann M. Haralambie, *Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process*, in *Child Welfare Law and Practice* 143-183 (Marvin Ventrell & Donald N. Duquette, eds., Bradford Publishing Co., 1st ed. 2005).

[19] "The funding incentives – hundreds of millions of dollars annually for larger states – are sufficient so that each state has determined it is in its interest to take the money. When a state avails itself of the federal financial support, it must comply with the requirements of the federal law." *Id.* at 144.

write federal "suggestions" into state law are huge. This means that loss or ineligibility for such pay-offs can be a crippling financial blow to each state's child welfare budget. "Every year, billions of federal, state and local dollars are used to finance child welfare services. In 2006, the cost for child welfare services nationwide was at least $25.7 billion. Almost half of that amount, $12.4 billion, was funded by the federal government." Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know*, 29(3) ABA Child Law Practice 33 (2010), available at www.childlawyerpractice.org. To fund foster care costs, a state that adopts the federal mandates can be reimbursed 50% to 83% of what it spends. *Id.* at 38.

B. State Laws Must Yield To The Constitution.

The state investigation laws are irrelevant to the resolution of the constitutional issues in this case, except as used by the lower court to establish criminal law enforcement purposes of the joint investigation. State laws establishing abuse investigation procedures must yield to the Constitution, even when the law promotes child protective purposes. The case of *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) illustrates this point. At issue was a state law restricting cigarette advertising around schools. The Court agreed that the law advanced an important public interest to curb underage smoking. Although this harm to children "poses perhaps the single most

significant threat to public health in the United States," the Court held that the First Amendment trumped this child-focused state law. *Id.* at 570. When the federal courts set the minimum constitutional standards in family matters "they are not diminished by the fact the state may have specified its own procedures that it may deem adequate for determining the pre-conditions to adverse action." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982); see *Monroe v. Pape*, 365 U.S. 167, 183 (1960) ("It is no answer that the State has a law which if enforced would give relief.").

C. Most Interview Laws Do Not Support The Police Officer's Presence At A School Interview.

The amici does not advocate deciding this case on state law or policy. But if the Court considers that authority, it does not favor Deputy Alford. Most states have laws allowing representatives of the public child welfare agency ("the Department" or "CPS") to interview a child at school about suspected maltreatment. Far fewer state laws expressly allow a police investigator to do the same. Only seven states, including Oregon, authorize a law enforcement officer to interview a suspected child abuse victim at a school. Kan. Stat. Ann. § 38-226; Neb. Rev. Stat. § 28-713; N.H. Rev. Stat. Ann. § 169-C:38, IV (West 2002 & Supp. 2010); N.M. Stat. Ann. 1978 § 32-A-4-3; Ore. Rev. Stat. § 419b/045; S.C. Code 1976, § 63-7-380.

D. The Juvenile Judiciary Will Not Be Burdened By A Constitutional Obligation To Rule On Requests For Investigation Orders. This Is Already Part Of Their Duties.

The petitioners argue that a warrant requirement should not be adopted because it places a burden on the judiciary. That is a policy argument, not a legal argument. Petitioners' proposition equates to a presumption that imposing additional safeguards is always burdensome and is thus, improper. As this Court explained in *Stanley v. Illinois*, "Procedure by presumption is always cheaper and easier than individualized determination." *Stanley v. Illinois*, 405 U.S. 645, 655 (1972). When protections of children and their families are at issue, it is clear that presumptions are disfavored. Further, the specific policy debate asserted by petitioners ended when the Constitution was adopted. The Fourth Amendment "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1585 (2010); see *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

The juvenile judiciary will not be burdened by an obligation to rule on requests for interview orders. Keep in mind that in most cases the order would be unnecessary due to exigency, parental consent, the young age of the child, or sufficient other evidence.

In the few remaining cases where an order is required to secure a necessary child's interview, like a verbal child in a sexual abuse investigation, juvenile judges can do their job and rule on order requests from the agency or police. Many of them are already doing that with no constitutional command. By statutes in some states they are already tasked with deciding investigation disputes by orders, before the dependency case is filed in most instances.[20] At least fourteen states allow the court to issue investigation orders for agency access to the child.[21] For the most

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[20] This is in addition to the routine rulings on protective custody or removal orders. As documented in other respondent amici briefs, *e.g.* Brief of CPS Watch, state law and federal circuit decisions require these orders. In that process, the juvenile judges are complying with the warrant and probable cause requirements imposed by the lower court in this case.

[21] *Alabama*: Ala. Code § 9.301(12) (2009) (best interest plus refusal); *H.R. v. Alabama Dep't of Human Resources*, 612 So.2d 477 (Ala. App. 1992) (probable cause read into statute).

Arkansas: Ark. Code Ann. § 12-12-510(b) (2009) (no standard).

Colorado: Colo. Rev. Stat. § 19-3-308(3)(b) (West 2005 & Supp. 2010) (good cause).

Delaware: 16 Del. Code Ann. § 910(a)(1)(3) (2003 & Supp. 2010) (need plus parent unavailable).

Florida: Fla. Stat. Ann. § 39.301(12) (West 2010) (best interest plus refusal).

Illinois: 325 Ill. Comp. Stat. 5/7.5 (West 2010) (best interest plus refusal).

Iowa: Iowa Code Ann. § 232.71B.5 (West 2010) (probable cause).

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part, the investigation access orders in state laws are issued with low to no legal standards, and far below probable cause (refusal or report only, best interest, good cause, reasonable suspicion). Only four of these statutes use the constitutional probable cause standard. But the probable cause standard is used in the 27 states where physical examination orders are constitutionally mandated by federal appeal courts.[22]

Kentucky: Ky. Rev. Stat. Ann. § 620/040(5)(a) (Lexis Nexis 2008) (probable cause plus refusal); 922 Ky. Adm. Regs. 1:330(3)(20).

Louisiana: La. Child Code 613(A) (2004) (reasonable suspicion plus refusal).

Minnesota: Minn. Stat. § 626.556(10)(e)-(f) (West 2011) (refusal).

New Hampshire: N.H. Rev. Stat. Ann. § 169-C:34(IV) (West 2002 & Supp. 2010) (child safety).

New York: N.Y. Fam. Ct. Act § 1034(2) (2009) (report plus refusal).

North Carolina: N.C. Gen. Stat. § 7B-303 (2003) (refusal) (2009).

Utah: Utah Code Ann. § 78A-6-106(1) (2003) ("investigative subpoenas" with warrant standard).

[22] *2d Circuit*: Connecticut, New York, Vermont

Tennenbaum v. Williams, 193 F.2d 582, 585 (2d Cir. 1999).

3d Circuit: Delaware, New Jersey, Pennsylvania

Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087, 1093 (3d Cir. 1989).

5th Circuit: Louisiana, Mississippi, Texas

Roe v. Texas Dep't of Protective & Regulatory Services, 299 F.2d 395, 407-08 (5th Cir. 2002).

7th Circuit: Illinois, Indiana, Wisconsin

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There is no evidence that juvenile judges are uniquely incapable of applying the probable cause standard to investigation access orders, like the interview order that should have been sought in the case before S.G. was seized at school. Indeed, juvenile courts are already handling orders on protective custody, removals, physical exams in the majority of states, all of which use the probable cause standard. They can be the "neutral and detached magistrate" required by the Fourth Amendment to referee a dispute between the government and a child with constitutional rights. Consequently, the suggestion that additional safeguards impose an unworkable burden on the juvenile judiciary is unavailing.

Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

9th Circuit: Alaska, Arizona, California, Idaho, Hawaii, Montana, Nevada, Oregon, Washington

Wallis v. Spencer, 202 F.2d 1126, 1141 (9th Cir. 2000).

10th Circuit: Colorado, Kansas, Oklahoma, New Mexico, Utah, Wyoming

Dubbs v. Head Start, Inc., 335 F.3d 1194 (10th Cir. 2003).

There is one additional state, Alabama, where examination orders are required by state law, but on less than probable cause. Ala. Code § 26-14-7(c) ("cause" plus refusal).

III. ALL PARTICIPANTS IN THE CHILD WELFARE SYSTEM BENEFIT FROM A COURT DECISION THAT SUPPORTS A RELIABLE, HUMANE, AND LAWFUL CHILD INTERVIEW ABOUT ABUSE. QUESTIONABLE INTERVIEWING PRACTICES CREATE AMBIGUITY IN THE JUVENILE LEGAL SYSTEM THAT DOES NOT FURTHER ITS CHILD PROTECTION MISSION.

The *Lidster* balancing test promoted by the petitioners includes evaluation of the degree to which the interview seizure advances the public interest. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). The petitioners have correctly argued that child protection in civil and criminal courts is an important and constitutional public purpose. *Prince v. Massachusetts*, 321 U.S. 158 (1944). An individual juvenile dependency case can be undermined when it lacks sufficient reliable evidence to make good decisions for a child's welfare. Unprovable maltreatment is just as damaging to the child as undetected maltreatment.[23] But an unjustified accusation of an innocent parent also harms the child. "In either case, the failure to obtain competent and reliable evidence of child sexual assault has a profound impact on the victim."

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[23] The latter is the only harm touted by the petitioners justifying their request for unregulated access to children. Their argument falls short. Detection, without proof, will not save a child. Only a civil or criminal court can legally separate a child from an unfit home or an unfit parent. To do that, the court needs reliable evidence.

Timothy L. Arcaro, *Child Victims of Sexual Abuse and the Law,* 12(3) Mich. Child Welfare L.J. 2, 5 (2009). Inappropriate child interviewing techniques "may significantly impact certain aspects of the child's account," which in turn affects "the reliability of the statements" and "may seriously compromise subsequent legal proceedings." *Id.*

The important public purpose of child protection is served only by humane, reliable, and lawful interviews of suspected child abuse and neglect victims.[24] This principle benefits all parties to the civil dependency case. Truth seeking and reliability of the juvenile court's decisions are undermined by questionable child interviewing practices. Civil child protection by state intervention is based on past harm or future danger. Those determinations must be based on evidence, not speculation or suspicion. Clearly, there is an adverse impact on the fact-finding process in a dependency case when the juvenile court must contend with an unreliable and unrecorded child statement. In this case the lack of reliability was exacerbated where the interview involved a child who did not report abuse before the interview and where the allegation was secured in an ambush of a

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[24] It may be surprising to this Court, but in most dependency cases a child is not interviewed during the initial investigation. The child may be too young, traumatized, or uninformed. Often the child's input is not necessary because a parent admits or there is other reliable and sufficient evidence to prove the case, like adult witnesses who encounter an abusive or neglectful situation.

special education elementary student at school by two strange men, one an armed uniformed police officer, and the other one badgering the student until her denials turned into accusations of "sexual abuse" against her father.[25]

Even without the child's later recantation,[26] the abuse allegation would be difficult to sustain. With the recantation, the juvenile court is left with ambiguous and unknowable facts. The lack of a recording of the interview presents an inexcusable and preventable credibility problem for the juvenile court. A recording requirement is one best practice on which all child forensic interview experts agree.[27] The only witness to Camreta's interrogation of S.G. was Deputy Alford, a local colleague of the other police agency in a small town that had arrested her father for molesting another child. Alford admits he had a tape recorder in his car, but he did not use it and he took no notes. The failure of the two investigating officers to record a child's initial interview about abuse "in a controlled situation and absent exigent circumstances, will be viewed with distrust in the

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[25] "Sexual abuse" is what the petitioners call it. It is difficult to ascribe that label to an allegation of touching the genital area through clothing by a sleeping father, in the absence of other evidence showing sexual intent. *Child Victims of Sexual Abuse and the Law, supra* at 3-4.

[26] See note 29 *infra*.

[27] Hollida Wakefield, "Guidelines in Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?" 24(3) Amer. J. Forensic Psychol. 57 (2006).

judicial assessment of the veracity of the child victims' statements." *State v. Weaver*, 964 P. 2d 713, 723 (Mont. 1998). This ambiguity and lack of reliability can lead to over-protection of a safe child or under-protection of a maltreated child, depending on which direction the doubts lead a particular judge. The bottom line is that all parties to a child welfare case are better served by a ruling from this Court that supports reliable, humane, and lawful child interviews.

While the damage to the dependency case for an unreliable child interview may not occur in all cases, its correlation to the most serious cases magnifies the harm from practices like those used on S.G. Although most of the policy advocacy of the petitioners and their amici is about child abuse, abuse cases are not the bulk of the juvenile docket. Child abuse is by far the smallest part of the dependency court case load. Child neglect comprises at least 90% of the cases reported to CPS, substantiated, and filed in court. When the more infrequent sexual abuse case is filed, amicus agrees with petitioners that the child's statement may be the sole or primary basis for making all the court decisions, including ordering a temporary to permanent break-up of the child's family.[28] The fact that the child's statement is essential in some of these most serious cases is, by far, the most compelling

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[28] There is usually no medical evidence to corroborate or rule out the sexual abuse, even if there was penetration. Vincent J. Palusci, *Identifying and Reporting Child Abuse and Neglect*, 10(3) Mich. Child Welfare L.J. 17, 21-22 (2007).

reason for investigators to take care to get it right – both factually and legally. Judicial involvement could help, too, in order to provide parameters to improve reliability of the important first child interview. For example, these parameters might include securing a skilled interviewer or conducting the interview in a humane and comfortable setting for the child. It is interesting that the petitioners want to cooperate with each other in an investigation, but they are not interested in cooperating with the juvenile court judge, who is in the best position to help them get the truth.

The facts of this case reveal just how severely a dependency case is impacted by faulty and unreliable interviews of suspected child abuse victims. Petitioners' investigative methods did not work for them in this case. They were able to conduct this investigation without the legal restrictions they oppose in this Court. Yet all the harms they claim will happen if the Fourth Amendment legal requirements are strictly applied occurred anyway – child recantation,[29]

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[29] The school interview of S.G. happened on February 24, 2003. The record is not clear on the exact date she first told her mother that she had lied about her father abusing her. It had to have been sometime between February 24 and March 11, 2003, before the two girls were put in foster care, because little sister K.G. overheard her sister confessing to their mother that she lied to Camreta. *Greene v. Camreta*, 2006 WL 75847 *2 (D. Ore. Mar. 23, 2006). When K.G. was interviewed at the assessment center on March 20, she reported the recant conversation. When S.G. came to the center on March 31, she also told the "lady" who did the physical exam that her father had not abused her. *Greene v. Camreta*, 588 F.3d 1011, 1019 (9th Cir. 2009);

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ambiguous and inadequate evidence, "burdening" the juvenile court with more hearings and orders, loss of dependency court protection, and an unsuccessful prosecution. By using parental consent or a court interview order to create optimal conditions for the child, the parent or the dependency court judge could have given the state and the child's family the best chance for getting to the truth. Instead, this flawed CPS and police investigation left the juvenile court with so much ambiguity that it had to release S.G. and her sister from protective custody and dismiss the case. When the criminal case against the father about molesting S.G. went to trial, it resulted in no conviction on the charges about S.G.[30]

An interview where a child is badgered into accusing a parent of abuse, and then immediately recants, yields unreliable evidence. Such evidence does not support the important child protection decisions

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Depos. S.G. 137-139 at Dist. Ct. Doc. 53, Ex. C. So the record shows that S.G. did not recant in order to go home, as the assessment center surmised. *Camreta v. Green,* at 1019-20 (quoting KIDS Center report: "[T]here appears to be a high likelihood that S.G. may have recanted her statements about her father touching her privates in an attempt to expedite her return home."). She was still living at home when she denied the abuse the first time.

[30] Two weeks after S.G.'s school interview, the grand jury indicted her father on multiple counts of felony sexual abuse against her and F.S., the five-year-old son of a family friend. *Greene v. Camreta,* 2006 WL 758547 *2 (D. Ore. Mar. 23, 2006). The jury could not reach a verdict. The case was plea bargained for a conviction on the boy, and a dismissal on his daughter. *Greene v. Camreta,* 588 F.3d 1011, 1020 (9th Cir. 2009).

of the juvenile court. It could result in a "hung" judge, just like the hung jury in Mr. Greene's criminal trial. Where the ultimate safety of a child hangs in the balance, it is of utmost importance to the child protection bench and bar that interviewing practices and procedures yield reliable results that aid in securing the best possible outcomes of protection and permanency for all children.

CONCLUSION

The attorneys who represent, advocate, negotiate, and fight their way through child protection cases all share this knowledge: good intentions do not always render good results. Normally, such a proposition is of little consequence but, in the context of protecting children from the ravages of child abuse, bad results could mean physical and emotional trauma, continued abuse, and sadly, even death of a child. In that regard, professionals who work on child welfare cases need the best tools possible, along with good intentions, if they are to achieve good results.

This case presents frightening components that could cripple the probability of good results (protecting children), including the suggestion that procedural safeguards are not necessary for protection of a child or the child's family during an interview of a suspected abuse victim so long as the subject matter alone shocks the conscience of the investigator. Yet, free reign and unchecked authority of investigators failed in this case because those tactics yielded

unreliable results. Consequently, if free reign is the rule, it will fail again.

National policy on child welfare and current practices reveal that the best results, protection of children, are obtained when child interviews are humane, reliable, and lawful. That involves implementing safeguards before and during a child interview. Safeguards are not additional burdens to the judiciary, they are additional tools for the child welfare bench and bar. The Children's Law Section of the State Bar of Michigan would ask this Court to consider that the burden of prosecuting, defending, and presiding over cases where critical evidence is obtained through unreliable means is far greater in scope and complexity than the burden of implementing additional safeguards that are more likely to result in reliable evidence. Ultimately, we all share the good intentions of protecting children with varying ideas of how to exercise that intent. In the end the child welfare law, policy, data, and current practice reveal that the best way to do so is to exercise that intent while recognizing the rights of children and their families during the investigative phase of child welfare cases.

Respectfully submitted,

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